IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

NOTICE OF MOTION NO. 1927 OF 2005

IN

SUIT NO. 870 OF 2000

Vidyut C. Shah & Ors. .. Plaintiffs

vs.

M/s. Standard Materials .. Defendants.
Gencies and Ors.

Mr. M.P.S. Rao a/w Alpana Ghone i/by Satpute
& Co. for plaintiff to oppose.
Nitin Thakker a/w Denzil D'mellow in support
for defendants.

CORAM : S.U.KAMDAR, J.

DATE : 24th August, 2005.

P.C.

. The present notice of motion has been taken out for substituting the security already furnished pursuant to the order dated 22.3.2000 in Notice of Motion No. 777 of 2000. By the present notice of motion the defendants are seeking that in place of the security which is furnished of a flat baring no. 2201 B situated in Vikas Towers at Walkeshwar be substituted by three flats being flat no. C-5, C-6

and C-21 situated in Vivek building in Santacruz West, Bombay. In so far as the flat No. C-5 is concerned, the same is owned under an agreement by one Mr.Kalpen J. Roy. Wife of Kalpen J. Roy is the defendant in the present suit. The valuation of the present three flats according to the defendant is around Rs. 1.55 crores and according to the plaintiff the valuation is around Rs. 1.25 crores. The suit claim which is being filed is for Rs. 1,02,062,07/- and thus according to the defendants the security even if taken as a conservative estimate as per the plaintiffs estimate still it is more than to secure the claim of the plaintiff in the suit. However, the learned counsel for the defendant has opposed the present notice of motion. It has been contended that the suit claim is not disputed as there is an acknowledgement of liability and in spite of the said acknowledgement of liability the defendant is dodging the plaintiff and not making payment of the suit claim. The aforesaid contention cannot be considered at this stage. Even if there is an admission of liability, it is open for the plaintiff to enforce the same by adopting appropriate legal proceedings but that can be no ground for refusal to substitute the security furnished by the defendant under the earlier orders. The next contention raised is that as on today the suit claim with interest is of about Rs. 1.80 crores. It is well settled that interest subsequent

to the filing of the suit is always at the discretion of the Court. In any event, what can be secured in favour of the plaintiff is the claim which is made in the suit and not the claim of interest subsequent to the filing of the suit. In that view of the matter, the contention raised is devoid of any merit. The third contention raised by the learned counsel for the plaintiff is that the said flats are old flats and the life of the building which is left is only 10 years. According to the defendant, after taking into consideration the depreciation at this stage, the valuation of the security offered is Rs.1.25 crores as per the plaintiffs estimate themselves and, therefore, the contention raised by the plaintiff that the building is old is irrelevant and thus does not required to be taken into consideration. The last contention raised is that the defendants are seeking to substitute security for sale of the flat which has been given as security under earlier orders to pay the liability of the third parties and thus, such substitution should not be permitted as they are seeking to give preference to other creditors over and above the plaintiffs herein. I find that the aforesaid contention is very strange because it is undoubtedly true that in the affidavit in support the defendants themselves have stated that they intend to sale the flat . In my opinion, as long as the claim of the plaintiff is duly secured, the

reasons for which the substitution of the security is sought is not a very material question. In light of the above, I pass the following order :

> Motion is made absolute in terms of prayer clauses (a), (b) and (c). However, the same will be subject to further condition that the defendants as well as the third party owners of the aforesaid flat No. C-5 and the person in use, occupation and possession of the said three flats along with other owner of the remaining two flats shall file in this Court a written undertaking stipulating as under:-
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> i) that they shall not alienate, encumber or create any third party right in respect of the said flats nor induct any person therein.
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> ii) that they will declare that there is no encumbrance of any nature whatsoever on the said flat as on today and that they would not create any encumbrance thereon and continue to pay regularly all the out-goings of the society charges and other dues which are required to be made in accordance with law.

iii) That the occupiers will also file an undertaking stating that they will continue to use, occupy and posses the said flats and shall not encumber, alienate or create any third party right therein or induct any person in the said flats without prior permission of the Court. The said undertakings are to be filed within a period of two weeks from today. The security to stand substituted after the said undertakings are filed.

iv) The defendant is further directed to deposit in Court the original documents in respect of the each of the flats together with share certificate and/or agreement for sale, etc. The plaintiffs as well as the defendants will intimate to the society that in respect of the said three flats this order has been passed and the copy of the order to be furnished to the society so that no transfer of any nature can be entered into in the record of the society.

2. Motion is disposed of accordingly. NO order as to costs.

3. The learned counsel for the defendant seeks stay of the order. Application for stay rejected.